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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

Nos. 287-288

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
BLOOMFIELD VILLAGE DRAIN DISTRICT and BLOOMFIELD No. 1 STORM SEWER DRAIN DISTRICT, et al.,
Respondents

PETITIONERS' REPLY BRIEF

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NOTE: In the accompanying brief reference to the printed record will appear in parentheses.

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PETITIONERS' REPLY BRIEF

We are quite familiar with this court's rule 38, and know that the writ of certiorari is sparingly granted. Yet running through the rule is the recognition that lower courts may commit grievous errors which this court should correct. The many cases in which certiorari has been granted and lower courts reversed proves the wisdom of supervisory jurisdiction in this court.

The rule implies that a fair showing of probable error by a lower court upon some question involving a constitutional right, a conflict with local law, or a conflict between the circuits, call for a review. All of these appear in this case.

I.

CONSTITUTIONAL RIGHTS

We think the court must reject the view advanced by respondents that a litigant cannot complain to this court that a court of appeals has denied him due process. If *Hansberry v. Lee,* 311 U. S. 32, had come to this court from a court of appeals, with a decision in identical terms with that rendered by the Supreme Court of Illinois, this court would have given the case the same consideration, the only difference being that it would then have been concerned with the application of the Fifth Amendment instead of the Fourteenth.

Without attempting to define due process, it surely means that a litigant must be given his day in court, with notice of the claim against him and a fair opportunity to be heard. When the court says that he has already had his day in court and must lose his case because some other tribunal has already decided against him in a case in which he is not a party, an appellate court would be remiss in its duties if it refused to at least consider the reasoning on which the lower court arrived at such conclusion.

When it appears that such reasoning is based upon a theory that someone else, whose interests are adverse to the litigant and who was never authorized to represent him in prior litigation, assumed to stand for him in such litigation, an appellate court must closely investigate the

reasoning upon which this unusual representative capacity is based.

In this case it is based upon a theory that one who purchases a bond of a Michigan drain district must deduce from a statute, which requires a taxpayer in a drain district who sues to cancel his taxes to join the drain commissioner, that he is conclusively bound in the future by adjudications made against the drain commissioner in such suits. We submit that there is such a wide gap between the express language of such statute and the interpretation which the court of appeals has placed upon it, that holders of drain bonds who find themselves denied relief because of this interpretation ought to be heard on the proposition that the interpretation is unsound. By Michigan law, the drain commissioner is only representative of the property owners and municipalities within the district, and there is no statute or decision which makes the commissioner a representative of bondholders.

We have already presented our view that the holding of the Circuit Court of Appeals that the state court decree in the taxpayers' case is *res judicata* against bondholders is so enmeshed in the argument of the Circuit Court of Appeals that it is impossible to extricate it, and still be certain that the conclusion would have been the same if this erroneous factor had not been considered (See p. 17 of our first brief.)

The argument that the Michigan Supreme Court, in *Meyering Land Co. v. Spencer and Stack*, 273 Mich. 703, had jurisdiction over bondholders because petitioners' attorney knew that this case was pending, is untenable. A personal decree against third parties cannot rest upon the ground that attorneys for such a party knew that a suit was pending, and were employed by one of the parties to

the suit to assist in arguing it. The court will note that most of the matter stated on page 18 of respondents' brief is information without any basis in the record (365).

We have no quarrel with the doctrine of *Kersh Lake Drainage District v. Johnson,* 309 U. S. 485, because the decision there is a sound exposition of the law with relation to the facts before the court. If the facts had been as they are here, that Johnson in his suit against the commissioners of the district had obtained a decree that the whole proceedings for the drain were void, this court would not have permitted such decree to stand as a former adjudication barring certificate holders to sue on their obligations. The court was merely applying a well recognized principle in the law of corporations that while a stockholder may not, by litigation between him and the corporation or its officers, in the absence of a creditor to be affected, litigate the corporate liability to the creditor, he may, in the absence of such creditor, litigate his own personal liability for an assessment on grounds personal to himself, such as the amount of his liability, whether it has been paid, etc. *14 C. J.,* p. 1068, Section 1662. This court has held that a decree against a corporation declaring bonds and a mortgage securing them to be void is not *res judicata* against bondholders, *Keokuk, etc. Ry. Co. v. Missouri,* 152 U. S. 301, although it has properly said, in *Beals v. R. R. Co.,* 133 U. S. 290, that a trustee under a trust mortgage, if sued in an action to cancel a mortgage, does represent bondholders so that the decree binds them. This is because the mortgage makes him their representative, and all bonds are purchased with that understanding. A trustee under a mortgage is selected by bondholders. He is under duty to act in their behalf in maintaining the security, and can be held accountable for failure to diligently and loyally perform his duties. A drain commissioner is selected without consultation of bondholders. No statute governing his

duties requires him to act in their behalf. He could, with entire impunity so far as personal accountability to bondholders is concerned, refuse to pay any attention to suits brought against him relating to the bond security.

The court of appeals could not have given very careful attention to the Michigan Drain Law, or it would have seen that in this state quite different provisions from those in Arkansas have been enacted to protect bondholders of a drain district against destruction of the security for their bonds. The theory of the Michigan law is that landowners must, during the proceedings, object to any wrongful acts or omissions occurring in the performance of the commissioner's duties. After a certain point in the proceedings, the assessments become binding, except in cases where due process has not been accorded. The lien of the tax is then perpetual until paid. Section 4927, Michigan Compiled Laws 1929, provides:

> "All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid."

Even in the few cases where taxes may be set aside because of a failure to observe the requirements of due process, the legislature has provided that bondholders shall not suffer, for Act 318 Michigan Public Acts of 1931, provides:

> "In all cases where assessments shall be set aside after contracts have been let or bonds sold, the decree shall make full provision for payment for work done and materials furnished under said contracts before the commencement of suit, and for the payment of such bonds and interest thereon, by reassessment according to benefits, or otherwise as equity may require."

II.

CONFLICT WITH LOCAL LAW

Respondents' protest against the course we suggest of awaiting the decision of a case now pending in the Supreme Court of Michigan, which will determine the local law on the questions involved here, is eloquent of their recognition of the error of the court of appeals. They want this case closed so that judges familiar with local law, and who have the last word as to what it is, can say nothing to upset the advantage they now possess.

We think it is trivial to argue that the case of *City of Highland Park, et al., v. Clark, et al.,* which the Supreme Court of Michigan will hear during the month of October of this year, can settle nothing so far as this court is concerned because it involves a different set of bonds. In an appendix to this brief we print a copy of the petition for mandamus filed in the Michigan Supreme Court (omitting exhibits except for the form of the bonds), and the answer to the order to show cause. This is sufficient to show that the crucial questions in this case are before the Michigan court. It must decide whether the drain law permits the building of projects which will afford complete drainage and sewerage service, whether, if such projects are illegal, bond recitals estop the district to assert such illegality against *bona fide* holders of the bonds, whether taxes must be levied to pay such bonds, and whether bondholders are protected by the certiorari provision of the law. It also must decide whether the decree in a taxpayer's suit is *res judicata* against bondholders. The appendix further refutes the idea that this is a trumped-up case to delay a decision here. Bondholders other than petitioners here, with other counsel representing them, own half of the bonds

involved and are entitled to sue for relief. Because they are citizens of Michigan, they must sue in the state court.

The precedent in *American Surety Co. v. Baldwin,* 287 U. S. 156, cited in our first brief, we think applicable to the point advanced that this court recognizes the desirability of postponing action on an application for a writ until the state court has decided some pending action which will settle local law. The fact that the same parties are involved in the state litigation is of no consequence. What this court apparently desires is a declaration by the state court of last resort of its view on a disputed question of local law. Since our first brief was prepared, other precedents have come to our attention. In *Michalek v. U. S. Gypsum Co.,* 76 Fed. (2) 115, a federal court of appeals had decided that a plaintiff was barred recovery by a local statute of limitations. Plaintiff applied for certiorari on the ground that the statute applied was wrongly interpreted, and that under a proper interpretation his suit was not barred. At the time another case, *Schmid v. Merchants Dispatch and Transportation Co.,* was pending in the state court, which was decided after the petition for certiorari was filed, in which the state court of last resort (270 N. Y. 287) held contrary to the opinion of the federal court of appeals that the statute should not be interpreted in a manner to bar a suit of the nature alleged in the federal court. This court deferred action on the writ for many months, awaiting the decision of the New York court of last resort, and when the same was rendered, promptly reversed the court of appeals on the ground that it had wrongly interpreted the state statute, *Michalek v. U. S. Gypsum Co.,* 298 U. S. 639, and remanded the case with directions to follow the New York decision.

During the last term of this court similar action was taken in *City Co. v. Stern and Chase Securities Corp v. Vogel,* 61 S. Ct. 823, cases involving the construction of a Minnesota statute of limitations. The court of appeals, in *City Co. v. Stern,* 110 Fed. (2) 601, and *Chase Securities Corp. v. Vogel,* 110 Fed. (2) 607, held that the statute should not be construed as barring plaintiff's claim. In an application for certiorari, petitioners showed that the same question was before the Minnesota court. This court deferred action on the application for ten months. When the Minnesota Supreme Court, in *Pomeroy v. National City Co.,* 296 N. W. 513, decided that the statute of limitations barred a similar claim and disagreed with the court of appeals, this court reversed the court of appeals, saying:

> "The petition for writ of certiorari is granted and the judgment is reversed. *Vandenbark v. Owens-Illinois Glass Co.,* 311 U. S. ..., 61 S. Ct. 347, 85 L. Ed. ..., decided January 6, 1941; *Pomeroy v. National City Co.,* ... Minn., 296 N. W. 518. The case is remanded to the Circuit Court of Appeals for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

This general subject is treated in Robertson & Kirkham *"Jurisdiction of the Supreme Court of the United States,"* Sec. 290, p. 559, and Sec. 301, p. 602.

CF. *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, and *Railroad Commission of Texas v. Pullman Co., et al.,* 61 S. Ct. 643.

This practice necessarily accords with the principle of avoiding conflict with state tribunals on matters of state law. Had the court done otherwise and lost jurisdiction,

a grave injustice would have been done to parties who had lost their cases in the court of appeals.

When this court decided *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and overruled *Swift v. Tyson*, 16 Pet. 1, it must have known that its labors would be increased in determining where conflicts existed with state law. The numerous cases decided as a result of the Erie Railroad Company case prove the mass of litigation entailed. While most of the cases on the subject which this court has heard involved an avowed disregard by a court of appeals of some state decision on the ground that it still could exercise an independent judgment, this court cannot draw a hard and fast line so limiting its jurisdiction. Cases are bound to arise where state decisions are so clearly wrongly interpreted, or where applicable decisions are disregarded or ignored on untenable grounds, that courts of appeal must be restrained in the interest of justice. If a litigant in the federal courts in a case brought there on the ground of diverse citizenship is entitled to be judged according to the law of the state, an erroneous construction of such law ought not to be overlooked merely because a court of appeals declares its purpose to abide by such law. If this court were convinced that a court of appeals wrongly applied or construed a decision of this court, while professing to follow it, it surely would not hesitate in an important case to take jurisdiction. We fail to see any fundamental distinction which should cause this court to deny certiorari when the question arises as to whether a court of appeals has actually followed state law.

When a court of appeals announces that it intends to follow state law and its opinion is in conflict with authoritative expressions of the state court of last resort, the difficulty may be that it has a wrong conception of how to arrive at a determination of state law. We think that this point

is largely the cause of our differences with respondents and the court of appeals. We believe that a brief consideration of this subject with reference to the various points decided will demonstrate the proposition that an erroneous process of reasoning colors the various conclusions reached by the court of appeals on this subject.

1. Whether the Drains Are Improvements Which Could Not Lawfully Be Constructed.

The basic guid on this subject is the statute; next comes its interpretations by Michigan courts. The facts as to how the drains were constructed and the character of the territory are not in dispute; hence the decision as to the drain's legality becomes a pure question of law, and was so treated by the trial court.

At the outset, we must note that the court of appeals, while professing to adopt the finding of the trial court as embodied in the confirmed master's report, did not do so. The court of appeals says (455) that the construction is "predominantly for sewer purposes." The report, however, says (89) the projects were constructed with the purpose of "providing for a complete system of both sewerage and drainage in the area through a partially urbanized stage of development (90). * * * A project constructed for the dual purpose of providing sewerage and drainage throughout all property in the district, where neither purpose can be found clearly dominant, is illegal under Michigan law."

This error by the court of appeals in stating the master's finding is not a trifling inaccuracy, for it is important to know under Michigan law whether sewage removal is actually the predominant or primary purpose. If not, the presumption of legality is not overcome.

The error of the court of appeals, as we see it, is that it ascribes to a decree of the Michigan Supreme Court with respect to this drain a statement of fundamental principles which should guide courts in deciding the issue of whether this is a drain or sewer, no matter what facts are presented or what new principles of law the state court of last resort may have subsequently announced. The fact that a decree has been rendered based on a finding of illegality, causes, in the opinion of the court of appeals, this drain always to be illegal, no matter what facts are shown or who is showing them. On this theory, if a court once held a stream to be navigable upon evidence submitted in one case, no other party could by other evidence, or a showing of other principles of law, convince another court that the finding was incorrect.

Apparently realizing that the master's finding of facts does not support the conclusion of illegality, respondents, page 26 of their brief, submit their own reasons why these improvements should be called illegal.

They say that the land drained naturally. However, this cannot determine illegality. Probably no drain was ever installed where there was not some natural drainage. The petitions for these drains, one of which was signed by the respondent Oakland Hills Country Club (438), asked for a drain which will properly drain the lands, indicating that landowners were not satisfied with the natural drainage. The boards of determination decided that the proposed drains were necessary.

The fact that a small sanitary sewer previously constructed by a landowner was permitted to empty into the drain concludes nothing. The same was done in respect to the drain considered in *Detroit Trust Co. v. Dingman*, 291 Mich. 170. Respondents are not consistent on this point, for on page 33 they point to this previously constructed

sanitary sewer in the Detroit Trust Company case as a distinguishing feature, which justified the conclusion that the project there considered was legal.

Depth in the ground, tightly closed joints, and Ys or house connections, were conditions all present in the drain held legal in the Detroit Trust Company case.

There is no foundation for respondents' claim that these improvements were not laid out in good faith. The commissioner and his engineers, Weaver and Wrenn (272, 331, 338) testified at length and no conclusion can be reached from their testimony as to any wrongful intent.

It is impossible to read the master's report, with the testimony on which it is based, without arriving at the conclusion that if he had known that the Michigan Supreme Court would reverse the decision of the Circuit Judge in *Detroit Trust Co. v. Dingman (supra)*, he would have held these structures legal.

2. Effect of Bond Recitals.

The error in the court of appeals' opinion and our adversaries' argument on the effect of bond recitals is in using local authorities which have nothing to do with the subject as a guide for decision. The court of appeals says (460), after citing cases involving only controversies between taxpayers and assessing officials, that "it is the law of Michigan that where projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of the projects are void in the hands of innocent holders." There is no such decision in Michigan, and the court of appeals and counsel point to none. The only case where any effort was made to obtain an adjudication against drain bondholders was *Kinner v. Spencer*, 257 Mich. 142,

where the court expressly declined to pass on their rights because they were not parties.

Of the prior decisions from Michigan on which the court of appeals relies, *Clinton v. Spencer*, 250 Mich. 135, and *Kinner v. Spencer*, 257 Mich. 142, are not in point because there the petition expressly asked for the construction of a sewer. As the drain commissioner's jurisdiction rests upon a proper petition, *Ranney Refrigerator Co. v. Smith*, 157 Mich. 302, there was a want of jurisdiction from inception, thus causing the entire proceedings to be void. This the Michigan court points out in its later opinion in *Kennedy v. Dingman*, 272 Mich. 24, 30. In this and companion cases in this court, no complaint can be made of the petitions. They asked for drains to properly drain the lands. The quotation which the court of appeals takes from *Village of Oak Park v. Van Wagoner*, 271 Mich. 450, and all of respondents' quotations from the same case, appear in a minority opinion in that case signed by three justices, which the remaining five justices, though concurring in the result, refused to sign. In *Meyering Land Co. v. Spencer*, 273 Mich. 703, and *Detroit Fire & Marine Insurance Co. v. County of Oakland*, 284 Mich. 130, the court merely finds from the evidence before it that sewers, and not drains, were intended, and that the commissioner, therefore, lacked jurisdiction to levy the tax. Respondents (p. 30 of their brief) also ask the court to consider a passage from a dissenting opinion in *Hankinson v. Deake*, 265 Mich. 1, which they think is so important as to call for italics, but they conveniently omit to say that it is found in a dissenting opinion. Also in the quotation on the same page from *Kennedy v. Dingman*, 272 Mich. 24, 30, there are serious omissions from the language of the Michigan court, without any indication that anything has been omitted from the quotation.

What a state court has said concerning the rights of taxpayers to have their taxes cancelled if the improvement is

a sewer rather than a drain does not determine what should be said as to the rights of bondholders who bought their securities relying on the recitals therein. It is a fair inference from *Kinner v. Spencer (supra)* that the court recognized that bondholders might have rights and equities which would require a decision upholding their bonds if their claims were before the court. In the absence of any opinion by a Michigan court as to the rights of such bondholders under those circumstances, the court of appeals and counsel are not following Michigan law when they say that bondholders have no rights, but are merely guessing as to what the Michigan court would say if the question were presented.

There is a marked distinction between these taxpayers' cases and the present bondholders' case. In the former the court was not cognizant of the fact that bonds had been issued with these recitals, and purchased in good faith. It was only rendering judgment on the particular facts before it. What a court decides with an inadequate factual background, and without considering the rights of other parties not involved in the transaction, may be quite different from what it decides with full knowledge of the facts and with all parties represented. It is erroneous to reason in the reverse fashion pursued by respondents and the court of appeals. By this reasoning they start with an inquiry as to whether taxes would be valid for the kind of improvement constructed. Having assumed that the taxes would be invalid, they say that then the bonds must be invalid. Respondents argue that if there was no jurisdiction or authority to levy taxes because the improvement was illegal, then it must follow that all bonds issued by the district, no matter what representations were contained in them, must be invalid. An abundance of court decisions refute the argument. The principle of estoppel in favor of good faith bondholders is now uniformly accepted, which operates to prevent against

them the assertion of those facts on which taxpayers could otherwise rely to defeat the levy of taxes.

There being no opinion by a Michigan Circuit or Supreme Court either way on the precise question of whether a drain district is estopped by its bond recitals to deny that the project for which the bonds were issued was a drain, we must necessarily look to Michigan decisions involving other bond issues where the controversies are as nearly similar as possible.

We have four decisions in Michigan relating to village or city bonds, cited in our first brief, p. 28, which ought to be accepted as close analogies by anyone willing to transform the concrete to the abstract. In Michigan, as in most jurisdictions, the constitution either expressly or impliedly forbids taxation for any but a public purpose. *People v. Salem,* 20 Mich. 452. Taxation for a private purpose or the pledging of credit for such purpose is illegal. It surely is a greater wrong to a taxpayer to impose a tax upon him to enrich some individual or a corporation, than to impose a tax for a public purpose, but under a wrong statute. The four cases we have cited all recognize such illegality, and hold that no one who extends credit to a municipality to enable it to act in this *ultra vires* manner can recover, if he knows the *ultra vires* purpose. But they all also hold that if he extends credit upon assurances of the municipality that it desires the money for a legitimate purpose, he may recover. What happens if he recovers judgment? From almost the beginning of statehood, Michigan statutes have provided that judgments against villages and cities may be certified to some officer, whose duty it is then to levy and spread a tax to pay it. Sec. 14960, Michigan Compiled Laws 1929. Thus the taxpayers in the village or city ultimately must pay a tax which has for its foundation acts of its officials which are wholly beyond their jurisdiction. The

thoughtless would say that this is incongruous, but actually it is not. A municipality obtains the power to borrow money for its corporate needs, and in borrowing it must observe common rules of business honesty. People who choose to live in a municipality or own property therein subject to taxation must pay taxes to discharge debts which the municipality incurs. The tax levied to pay the judgment is not to promote the illegal object which prompted the creation of the debt, but to discharge an obligation imposed on the municipality by its false representations and pretensions. There is nothing strange or unusual in this result. It applies to private corporations, voluntary associations and partnerships. All may be estopped by acts which are performed in the name of the entity, by an agent acting within the scope of his authority.

In asserting impliedly that Michigan law is opposed to this uniform rule, the court of appeals must have failed to recognize in these four cases which we have cited the abstract principles which govern them. It has been misled by a meaningless slogan often asserted by our adversaries that there can be no liability where there is total lack of jurisdiction, without noting that most slogans are only half truths.

The slogan is, of course, true under some conditions. If by total lack of jurisdiction is meant a total absence of any delegated power under all circumstances, which a purchaser of a bond must know, because he is presumed to know the law, it is true. If it means lack of authority in the official who acts for the municipality because he has not been authorized to act for it in the business under consideration, it is also true. But if power has been delegated, to be exercised only on a condition, and the officer authorized to execute the power is the one directed to perform the condition, the representation he makes in the bonds, as

agent of the municipality in charge of obtaining the loan, is the representation of the municipality and estops it. The estoppel is not confined to mere procedural defects,—some failure to observe specified formalities. It applies to the most flagrant breaches of the law that can be imagined,—the most absolute abuses of the borrowing power.

The error of the Court of Appeals in rejecting the authority of these four Michigan decisions and advancing two other decisions, *Spitzer v. Village of Blanchard,* 82 Mich. 234, and *First Wisconsin National Bank v. Bessemer Township,* 286 Mich. 426, in support of the conclusion reached, is quite patent. These decisions do not support the claim that borrowing for an illegal purpose, and thus acting without jurisdiction, avoids the estoppel rule. They relate to the question of what facts recited by an issuing officer may not be relied upon. The facts which the officers in these cases recited were entirely outside the scope of authority of the officers. They were conditions required to exist and be known, but the legislature had prescribed other definite and readily accessible sources of information which would disclose their existence or non-existence. The bond purchaser failed to investigate the exclusive source of information prescribed. This is quite different from the facts here. In the drain bonds the matter relates to the acts of the commissioner himself, to the performance of his own duties. He had power and it was his duty to obviate every condition which would make this drain a sewer, to design it so that no court could say it was a sewer. He represented that he had done so. He certainly had jurisdiction up to the time he began to plan the drain. If what he planned was too deep in the ground, too large, too expensive, too intricate to be a drain, then he should have eliminated the objectionable features. No bond case can be found where an issuing officer, who had power and whose duty it was to make the recitals in the bonds true, is not held to have

authority to make the recitals. In several places in respondents' brief, they refer to events which occurred after the bonds were sold, e. g., specification 3 on page 26. While in taxpayers 'suits the court has at times referred to facts occurring subsequent to the levy of taxes, it has never laid down any rule that the validity of taxes can be affected by the use to which the improvement has been put. On grounds of simple logic, it is impossible to see how a tax once legally levied, or a bond legally issued, could become illegal by any unlawful acts of the municipality in handling the improvement constructed. At the time the bonds were issued, December 1925 (434), the drain had not been constructed, and no part of the proceedings taken prior to that time showed any violation of law, or any intent to issue the bonds for a purpose other than drainage within the district, as authorized in the constitution.

We will not enlarge on what we have said in our first brief in regard to the propriety of including in the judgment relief against parties other than the drain district. The relief against the County is based upon obligations laid upon it by the statutes of the state. It is the custodian of the drain fund, which it had in part wrongfully diverted and threatened to continue to divert. It had refused to advance moneys from its general fund for the payment of the bonds, as the statute commanded. Its duties were not assumed by any voluntary act on its part, but because the legislature had ordered that they be performed. The Oakland Hills Country Club and International Realty Company were taxpayers who threatened by every means in their power to thwart officers in the performance of their duties, by using decrees obtained by them in suits to which bondholders were not parties to prevent officers from performing their duties. The officers were the instruments selected by the law for the collection of the taxes. It was not essential that any of these parties should have signed the bonds,

there being nothing in the statute which required signature by any officers other than the commissioner and the clerk. There is no statute or Michigan decision to which the court or respondents can point which says directly or impliedly that duties which the district court judgment imposes upon these parties, other than the drain districts, can be avoided on the ground that they did not sign the bonds and, therefore, are not estopped to assert their invalidity as debts of the districts. It is as much their duty to recognize bonds held valid on the ground of estoppel, as bonds held valid on any other ground. *Board of Commissioners, Santa Fe County, v. Territory of New Mexico, ex rel. Bird,* 215 U. S. 296.

A consideration of *Cooper v. Little,* 220 Mich. 62, and *Brooks v. Oakland County,* 268 Mich. 637, cited by the court of appeals and respondents, shows their inapplicability to this case. No claim was there made in relation to taxes levied against the county under the drain law; no injunction was asked against it to enjoin wrongful use of judicial process in tax evasion. In the one case, the point involved was whether a suit against a drain commissioner was county litigation so as to relieve the appellant from paying a court fee. In the other, the point involved was whether illegally levied drain taxes could be recovered from the county, because they had gone into funds kept by the county, it appearing that they had been paid out to discharge debts of the district, and that the taxpayer had failed to comply with statutory requirements as to suits to recover taxes alleged by him to have been wrongfully imposed.

3. Effect of Statute Prohibiting Collateral Attack on Drain Proceedings.

Respondents' argument, p. 51 of their brief, that the court of appeals did not err in ignoring the proposition that the certiorari provision of the drain law prohibits collateral attack, wholly misses the point of our argument and fails to meet it. We point to the express terms of the statute, its interpretation at the time the bonds were issued in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, wherein the court declares that the statute forbids all collateral attack where nothing more than a statutory violation is involved. We concede that after these bonds were issued the court has receded from the view formerly expressed, and now says that statutory violations of a jurisdictional character are subject to collateral attack. The point that they miss is that the Michigan Supreme Court has also held that changes in statutory construction subsequent to the accrual of rights under the prior construction are not applied retroactively to unsettle such rights. We cite two Michigan authorities which so hold, *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, 127, and *Donohue v. Russell,* 264 Mich. 217, 219. Respondents do not deny the fact that under the decisions prior to the issuance of these bonds the certiorari statute was interpreted as we contend it was, nor do they deny that in Michigan the rule of forward operation applies where to do otherwise would unsettle vested rights. These Michigan decisions accord with the rule stated in *14 Am. Jur.*, p. 345:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts

> have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. * * * The true rule in such cases is held to be to give a change of judicial construction in respect of a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is, make it prospective, but not retroactive."

The same rule is also stated in quite similar language in *21 C. J.*, Sec. 194, b. p. 329.

Had counsel examined Judge Cardozo's opinion in *Great Northern Railroad Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 364, they would have seen that this is not a peculiar rule in the federal courts, but that it applies quite generally. Certainly if the decisions of a state court establish it in the law of a jurisdiction, *Erie Railroad Co. v. Tompkins (supra)* requires federal courts to follow it.

Respondents urge, however, that to hold the bonds enforceable by applying this statute would result in the imposition of a tax which would be unconstitutional. (See p. 48 of their brief.) They cite in support of this, on p. 49, a passage from a minority opinion in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and also quote from *Fuller v. Cockerill,* 257 Mich. 35, which they repeat on p. 52.

What constitutional right of a taxpayer could be violated by imposing a special tax on his property for the benefit accruing to it from a sewer? Such improvements certainly are public enterprises and can be the subject of special assessments. The Michigan Supreme Court has

twice rejected the proposition that a subsequent amendment of the drain law authorizing the building of sewers and assessments therefor is unconstitutional. *Township of Warren v. Engelbrecht,* 251 Mich. 608; *Gray v. Dingman,* 279 Mich. 62. If this project was a sewer, the commissioner exceeded only a statutory authority and violated no constitutional provision, for the legislature could have declared in 1925, as well as in 1929, that a sewer could be built under the drain law. No intervening change in the constitution had occurred to give the 1929 amendment a constitutional basis, which it would not have had in 1925.

The nature of defects in drain proceedings which at the time these bonds were issued could be urged against the validity of taxes in collateral suits were only those which result from a failure to observe the requirements of due process. A commissioner may act without jurisdiction, as noted in *Township of Clarence v. Dickinson* and *Stellwagen v. Dingman (supra),* without violating due process. What he does may be wrong and without statutory authority, but that does not violate due process. From the time of the passage of the certiorari provision and until *Clinton v. Spencer,* 250 Mich. 135 (decided in 1930), there had been no Michigan decision permitting collateral attack on a drain tax, except where due process was violated. Either there was a lack of notice or fraudulent conduct of the officials in preventing an impartial hearing on some question vital to the taxpayer. It is only in *Clinton v. Spencer (supra), Kinner v. Spencer (supra), Township of Lake v. Millar (supra), Village of Oak Park v. Van Wagoner (supra)* and *Meyering Land Company v. Spencer,* 273 Mich. 703, all decided subsequent to the issuance of these bonds, that the court departed from its earlier rule and permitted an act involving only a statutory violation, un-

connected with notice or hearings, to open the door to collateral attack against the express provisions of the statute.

Fuller v. Cockerill (supra) is clearly not in point, for the drain there considered was one proposed under Act 462 of Local Act 1907. This local act applied only to Muskegon County, and contained no certiorari provision or language prohibiting collateral attack. The drain had not been built, contracts had not been let, and the defect urged was that the superintendent of drains was proposing to levy taxes for a drain wholly within a village, to which his territorial jurisdiction did not extend. The passage from the opinion quoted by respondents is undoubtedly true, for due process in special assessment proceedings requires that decisions be made and acts performed by an officer possesssing territorial jurisdiction. What the superintendent of drains was there proposing to do was the same as if the drain commissioner of Macomb County had attempted to perform the duties of a drain commissioner of another county.

The term "due process" may not be capable of precise definition, but it has never been held to apply where a party whose property may be subjected to a tax has had notice of the proceedings and an opportunity to be heard by a duly appointed officer acting within his territorial jurisdiction. It may have been a technical violation of the law to impose a tax upon the property owners of the drain district for an improvement which did not possess all the qualifications of a drain, but all taxpayers had notice of the proceedings and opportunity to object, and all, by failure to object and to follow same with certiorari proceedings, waived their objection.

III.

FEDERAL COURTS MAY UNDER PROPER CONDITIONS RESTRAIN PARTIES FROM USING STATE COURT DECREES TO IMPEDE TAX COLLECTIONS

It is true that the Court of Appeals does not in its decision expressly hold that it could not restrain the use of state court decrees to impede tax collections, but it is inferable from the opinion that it believes, as respondents contend, that *Erie Railroad Co. v. Tompkins* would now prevent such action. It says (457) that "sweeping injunctions" were issued by the district court, and that its decree is squarely at variance with the decree in the Meyering Land Company case (458).

We are concerned with this point because of the following reasoning. If this court should remand the case on the ground that the court of appeals erroneously decided that the bonds are invalid, we would be faced with the claim, as indicated by respondents in their argument on this point, that the district court erred in issuing these sweeping injunctions. They were necessary for the protection of bondholders, for if Oakland Hills Country Club and other taxpayers could institute contempt proceedings based on their decrees, should tax officials perform the district court decree, taxes against these particular taxpayers or their lands would be lost, thus diminishing the security on which the bonds rest. From past decisions by this court, we think the most likely course which this court would pursue if it takes jurisdiction and finds error in the Court of Appeals opinion, will be a remand, in which event we think it important that some declaration be made to the effect that the district court had power to make the injunctions as sweeping as it did.

IV.

CONCLUSION

We fail to see how respondents could misconstrue anything said in our petition and first brief to the effect that we deem conflict with local law an improper ground for this application. Rule 38 5b certainly indicates this as a proper ground, and we have invoked it. Too many cases brought to this court from a court of appeals have been reversed, where the only ground for certiorari is conflict with local laws, to suppose that this court considers the matter closed by a decision of the court of appeals.

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